Supreme Court, U. S.
FILED
APR 22 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1573

HAROLD WITHROW, D.O.;
THOMAS HENNEY, M.D.;
A. J. SANFELIPPO, M.D.;
JOHN M. IRVIN, M.D.;
J. W. RUPEL, M.D.;
A. L. FREEDMAN, M.D.;
MARK T. O'MEARA, M.D.;
THOMAS W. TORMEY, JR., M.D.;
individually and as members of
the Medical Examining Board of
the State of Wisconsin,
Appellants,

v.

DUANE LARKIN, M.D.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

ROBERT W. WARREN
Attorney General of Wisconsin

BETTY R. BROWN
Solicitor General of Wisconsin

LE ROY L. DALTON
Assistant Attorney General of Wisconsin

Counsel for Appellants

P.O. Address:
114 East, State Capitol
Madison, Wisconsin 53702

April 18, 1974

INDEX AND SYNOPSIS OF ARGUMENT

Page

OPINIONS BELOW 2

JURISDICTION 2

WISCONSIN STATUTES INVOLVED 3

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 4

THE QUESTIONS PRESENTED ARE SUBSTANTIAL, IMPORTANT, AND REVIEW AND ACTION BY THIS COURT IS REQUIRED 10

I. The Decision Below Is Contrary To Decisions Of This Court In All Material Respects 10

A. The declaration that a state statute is unconstitutional in deciding a mere motion for a preliminary injunction is, as stated by this Court, "serious error" and requires reversal of the judgment 10

B. The lower court decision that it is a violation of due process for an administrative agency to possess and exercise both investigative and adjudicative functions is contrary to the decisions of this Court 12

1. This Court has held that the mixing of such functions in an administrative agency is not a violation of due process 12

Page

2. The decision of the lower court misconstrues and misapplies certain decisions of this Court 16

C. The decision granting a preliminary injunction in this case is contrary to the decisions of this Court and, if any discretion to grant the motion arose, doing so constituted an abuse of discretion 20

1. All applicable decisions of this Court were disregarded and violated by the decision of the lower court 20

2. If the lower court here possessed any discretion to grant the motion, its decision is an abuse of discretion 24

II. The Decision Of The Lower Court Is The Result Of Such A Departure From The Accepted And Usual Course Of Judicial Proceedings That This Court Should Exercise Its Power Of Supervision Over Lower Federal Courts And Take Appropriate Action 27

III. The Effect Of The Decision Below Is Widespread And Undesirable 32

CONCLUSION 34

CASES CITED

Alabama Public Service Com'n v. Southern Ry. Co. (1951), 341 U.S. 363, 71 S.Ct. 775, 95 L.Ed. 1016 20

Page

Amos Treat & Co. v. Securities and Exchange Commission (D.C. Cir. 1962), 306 F. 2d 260 16

Askew v. Hargrave (1971), 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed. 2d 196 28

Beacon Theatres, Inc. v. Westover (1959), 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed. 2d 988 ..... 20, 21

Cameron v. Johnson (1968), 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed. 2d 182 21

Duke v. North Texas State University (5th Cir. 1973), 469 F. 2d 829, cert. den. — U.S. —, 93 S.Ct. 2760, 37 L.Ed. 2d 160 16

Ex Parte Fahey (1947), 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041 20

Federal Trade Comm. v. A. McLean & Son (7th Cir. 1936), 84 F. 2d 910 16

Federal Trade Comm. v. Cement Institute (1948), 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010, reh. den. 334 U.S. 839, 68 S.Ct. 1492, 92 L.Ed. 1764 13

Federal Trade Comm. v. Cinderella Career and Finishing Schools, Inc. (D.C. Cir. 1968), 404 F. 2d 1308 16

Gagnon v. Scarpelli (1973), 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656 ..... 16, 17, 18, 19

Page

Geiger v. Jenkins (N.D. Ga. 1970),
316 F.Supp. 370 29

Geiger v. Jenkins (1971),
401 U.S. 985, 91 S.Ct. 1236,
28 L.Ed. 2d 525 29

Gibbs v. Buck (1939),
307 U.S. 66, 59 S.Ct. 725,
83 L.Ed. 1111 21

Gibson v. Berryhill (1973),
411 U.S. 564, 93 S.Ct. 1689,
36 L.Ed. 2d 488 ..... 12, 15, 21, 28

Goldberg v. Kelly (1970),
397 U.S. 254, 90 S.Ct. 1011,
25 L.Ed. 2d 287 ..... 17, 18, 19

Goldstein v. Cox (1970),
396 U.S. 471, 90 S.Ct. 671,
24 L.Ed. 2d 663 2

Hatahley v. United States (1956),
351 U.S. 173, 76 S.Ct. 745,
100 L.Ed. 1065 25

Hecht Company v. Bowles (1944),
321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 22

Henneford v. Northern Pac. Ry. Co. (1938),
303 U.S. 17, 58 S.Ct. 415, 82 L.Ed. 619 20

Illinois Commerce Commission v. Thomson
(1943), 318 U.S. 675, 63 S.Ct. 834,
87 L.Ed. 1075 22

Intercontinental Indus. Inc. v. American
Stock Exch. (5th Cir. 1971), 452 F. 2d 935 16

Page

Kelley v. Everglades Drainage District (1943),
319 U.S. 415, 63 S.Ct. 1141, 87 L.Ed. 1485 25

Larkin v. Withrow (E.D. Wis. 1973),
368 F.Supp. 793 2

Larkin v. Withrow (E.D. Wis. 1973),
368 F.Supp. 796 2

Mack v. Florida State Board of Dentistry
(5th Cir. 1970), 430 F. 2d 862 16

Marcello v. Bonds (1955),
349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 ..... 15, 33

Massachusetts State Grange v. Benton (1926),
272 U.S. 525, 42 S.Ct. 189, 71 L.Ed. 387 21

Mayo v. Lakeland Highlands Canning Co.
(1940), 309 U.S. 310, 60 S.Ct. 517,
84 L.Ed. 774 ..... 11, 21, 25, 30

Mitchum v. Foster (1972),
407 U.S. 225, 92 S.Ct. 2151,
32 L.Ed. 2d 705 28

Moody v. Flowers (1967),
387 U.S. 97, 87 S.Ct. 1544,
18 L.Ed. 2d 643 28

Morrissey v. Brewer (1972),
408 U.S. 471, 92 S.Ct. 2593,
33 L.Ed. 2d 484 ..... 17, 18, 19

National Labor Relations Bd. v. Donnelly
Garment Co. (1947), 330 U.S. 219,
67 S.Ct. 756, 91 L.Ed. 854 15

Ohio Oil Co. v. Conway (1929),
279 U.S. 813, 49 S.Ct. 256,
73 L.Ed. 972 21

Page

Pangburn v. C.A.B. (1st Cir. 1962),
311 F. 2d 349 16

Pennsylvania v. Williams (1935),
294 U.S. 176, 55 S.Ct. 380,
79 L.Ed. 841 22

Railroad Commission of California v. Pacific
Gas and Electric Co. (1938), 302 U.S. 388,
58 S.Ct. 334, 82 L.Ed. 319 22

Richardson v. Perales (1971),
402 U.S. 389, 91 S.Ct. 1420,
28 L.Ed. 2d 842 ..... 14, 32

Sampson v. Murray (1974),
— U.S. —, 94 S.Ct. 937, 39 L.Ed. 2d 166 ..... 21, 23, 25

Schmidt v. Lessard (1974),
— U.S. —, 94 S.Ct. 713, 38 L.Ed. 2d 661 ..... 2, 27

Semler v. Oregon State Board of Dental
Examiners (1935), 294 U.S. 608,
55 S.Ct. 570, 79 L.Ed. 1086 29

State Corp. Commission v. Wichita Gas Co.
(1934), 290 U.S. 561, 54 S.Ct. 321,
78 L.Ed. 500 21

Terrace v. Thompson (1923),
263 U.S. 197, 44 S.Ct. 15,
68 L.Ed. 2d 255 ..... 20, 21

Toomer v. Witsell (1948),
334 U.S. 385, 68 S.Ct. 1156,
92 L.Ed. 1460 ..... 20, 21

Page

Trans World Airlines v. Civil Aeronautics
Board (D.C. Cir. 1958), 254 F. 2d 90 16

Virginian Ry. Co. v. System Federation
(1937), 300 U.S. 515, 57 S.Ct. 592,
81 L.Ed. 789 22

Watson v. Buck (1941),
313 U.S. 387, 61 S.Ct. 962,
85 L.Ed. 1416 21

Wyman v. Rothstein (1970),
398 U.S. 275, 90 S.Ct. 1582,
26 L.Ed. 2d 218 2

Yakus v. United States (1944),
321 U.S. 414, 64 S.Ct. 660,
88 L.Ed. 834 22

Younger v. Harris (1971),
401 U.S. 37, 91 S.Ct. 746,
27 L.Ed. 2d 669 ..... 20, 21, 28

UNITED STATES CONSTITUTION

Fourteenth Amendment 4

UNITED STATES STATUTES AND RULES

5 U.S.C. §554 (d) 33

5 U.S.C. §554 (d) (2) 33

5 U.S.C. §554 (d) (2) (C) 34

28 U.S.C. §1253 2

28 U.S.C. §1343 2

28 U.S.C. §2201 2

Page

28 U.S.C. §2281 ..... 2, 28, 29

28 U.S.C. §2283 28

42 U.S.C. §1983 2

Federal Rules of Civil Procedure:

Rule 7 (b) 10, 24, 29

Rule 52 (a) 4, 9, 24, 25, 30

Rule 54 (a) 30

Rule 57 29

Rule 58 30

Rule 65 (a) (2) 11

Rule 65 (b) 29

Rule 65 (d) 27, 30

WISCONSIN STATUTES

Chapter 227 ..... 19, 25

Section 227.17 25

227.20 25

227.20 (2) 25

Chapter 448 3

Section 448.17 ..... 3, 5, 6, 8, 10, 26

448.18 ..... 6, 8, 10

Page

Section 448.18 (1) 5

448.18 (2) 5

448.18 (3) 5

448.18 (7) 1,2,3,5,7,8,9,11,19,24,25,26,31

OTHER AUTHORITIES

43 C.J.S., Injunctions, §15 20

7 Moore's Federal Practice,

§65.04 [3] 23

§65.18 [3] 20

11 Wright and Miller,
Federal Practice and Procedure,

§2947 26

§2948 20

§2949 23

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No.

HAROLD WITHROW, D.O.;
THOMAS HENNEY, M.D.;
A. J. SANFELIPPO, M.D.;
JOHN M. IRVIN, M.D.;
J. W. RUPEL, M.D.;
A. L. FREEDMAN, M.D.;
MARK T. O'MEARA, M.D.;
THOMAS W. TORMEY, JR., M.D.;
individually and as members of
the Medical Examining Board of
the State of Wisconsin,
Appellants,

v.

DUANE LARKIN, M.D.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Eastern District of Wisconsin, entered on January 31, 1974, and in which a three-judge court declared sec. 448.18 (7), Wis. Stats., unconstitutional and preliminarily enjoined the appellants from utilization of that subsection of the statutes. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin, consisting of the Honorable F. Ryan Duffy, Senior Circuit Judge, the Honorable John W. Reynolds, District Judge, and the Honorable Myron L. Gordon, District Judge, dated December 21, 1973, is reported at 368 F.Supp. 796. The opinion of the Honorable Myron L. Gordon, District Judge of the United States District Court for the Eastern District of Wisconsin, dated October 1, 1973, is reported at 368 F.Supp. 793. A copy of the opinion of the three-judge court is found in the appendix hereto (App. 2-4).

JURISDICTION

This is an action for declaratory and injunctive relief brought under the Civil Rights Act, 42 U.S.C. §1983. Jurisdiction of the district court was invoked under 28 U.S.C. §1343, 2201, and 2281. A three-judge district court was convened and the judgment of that court, which declared sec. 448.18 (7), Wis. Stats., unconstitutional and preliminarily enjoined its utilization, was dated and entered on January 31, 1974. Notice of appeal therefrom was filed in that court on March 1, 1974. Copies of the judgment and notice of appeal are included in the appendix hereto (App. 4-7).

The jurisdiction of the Supreme Court to review this decision of a three-judge court by direct appeal is conferred by 28 U.S.C. §1253. Cases sustaining the jurisdiction of the Supreme Court to hear this appeal include *Goldstein v. Cox* (1970), 396 U.S. 471, 90 S.Ct. 671, 24 L.Ed. 2d 663, *Wyman v. Rothstein* (1970), 398 U.S. 275, 90 S.Ct. 1582, 26 L.Ed. 2d 218, and *Schmidt v. Lessard* (1974), — U.S. —, 94 S.Ct. 713, 38 L.Ed. 2d 661.

WISCONSIN STATUTES INVOLVED

Chapter 448 — Medical Examining Board

448.17 Investigation; hearing. The examining board shall investigate, hear and act upon practices by persons licensed to practice medicine and surgery under s. 448.06, that are inimical to the public health. The examining board shall have the power to warn and to reprimand, when it finds such practice, and to institute criminal action or action to revoke license when it finds probable cause therefor under criminal or revocation statute, and the attorney general may aid the district attorney in the prosecution thereof.

448.18 Revocation. * * *

* * *

(7) A license or certificate of registration may be temporarily suspended by the examining board, without formal proceedings, and its holder placed on probation for a period not to exceed 3 months where he is known or the examining board has good cause to believe that such holder has violated sub. (1). The examining board shall not have authority to suspend a license or certificate of registration, or to place a holder on probation, for more than 2 consecutive 3-month periods. *All examining board actions under this subsection shall be subject to review under ch. 227.* [Emphasis added.]

QUESTIONS PRESENTED

1. Can a district court in deciding a mere motion for a preliminary injunction declare a state statute unconstitutional and preliminarily enjoin *all* utilization of the statute?

2. In the absence of disqualification because of actual bias or personal interest, is it a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution for the members of a state administrative board or agency to possess and exercise both the power to investigate and the power to adjudicate?

3. When the movant for a preliminary injunction to enjoin the enforcement and operation of a state statute presents to the district court an inadequate motion and ABSOLUTELY NO EVIDENCE establishing or even attempting to establish ANY of the following: a) lack of an adequate remedy at law, b) exhaustion of his administrative remedies, c) a reasonable probability of success on the merits, d) irreparable and certain injury if the requested relief is not granted, and e) lack of undue harm to the public interest, and the district court makes no Findings of Fact and Conclusions of Law as required by Rule 52 (a), FRCP, does the district court have power to grant such injunctive relief and, if so, does such action constitute an abuse of discretion?

4. Should the district court have abstained from interfering with this state administrative proceeding?

STATEMENT OF THE CASE

The appellee, hereinafter referred to as Dr. Larkin, is a resident of the State of Michigan and is licensed to practice medicine in that state. He, on the basis of the medical licensing reciprocity agreement between the states of Michigan and Wisconsin, applied for and in August, 1971, was granted a license to practice medicine and surgery in the State of Wisconsin by the appellants, who are members of the Medical Examining Board and are hereinafter referred to as members of the Board.

The Medical Examining Board is the state administrative agency which issues licenses to practice medicine in Wisconsin. It also, under the provisions of sec. 448.17, Wis. Stats., has authority to investigate practices inimical to public health and can warn or reprimand a licensee if it finds that the licensee is engaged in such practices. If its investigation discloses probable cause for doing so, it may also complain to a district attorney and seek the institution of an appropriate criminal prosecution or of a civil action to revoke the license of the licensee.

The Board has no power to revoke or suspend a license, except under the here inapplicable provisions of sec. 448.18 (3), Wis. Stats., and under the here applicable provisions of sec. 448.18 (7), Wis. Stats. The latter authorizes the Board to temporarily suspend a license for not to exceed three months if it has good cause to believe that a licensee is engaged in immoral or unprofessional conduct as defined in sec. 448.18 (1), Wis. Stats. Revocation and other than temporary suspension of a medical license can be accomplished only after a successful court action brought by a district attorney. Sec. 448.18 (2) and (3), Wis. Stats.

Dr. Larkin, after receiving his Wisconsin license in August, 1971, immediately rented offices in Milwaukee, Wisconsin, and, as subsequently learned, did so under the alias, Glen Johnson. He specialized in the performance of abortions and commuted between Detroit and Milwaukee. He initially spent Fridays, Saturdays, and Sundays performing abortions in Milwaukee. After February, 1973, however, he came to Milwaukee on only very infrequent occasions and practically all abortions were performed by an associate, who received a percentage of the gross fee per abortion.

On June 20, 1973, the Medical Examining Board issued and mailed to Dr. Larkin a Notice of Investigative Hearing to be held at a designated time and place on July 12, 1973. The subject of the investigation was stated therein and Dr. Larkin, either with or without counsel, was invited to attend the ex parte investigative hearing, which was to be held under the authority granted to the Board by sec. 448.17, Wis. Stats.

Dr. Larkin, on July 6, 1973, filed a civil rights action against the members of the Board in the United States District Court for the Eastern District of Wisconsin. In such action he sought a permanent injunction, a preliminary injunction, and a temporary restraining order enjoining the members of the Board from investigating or holding any kind of hearing on his medical practices. The motion for a temporary restraining order was denied and the court established a briefing schedule on the motion for a preliminary injunction.

On July 12, 1973, the members of the Board filed a motion to dismiss the action on the ground that the complaint failed to state a claim upon which relief could be granted. Larkin, on the same day, filed an unverified amended complaint, a new motion for a temporary restraining order and preliminary injunction, and a motion to convene a three-judge court. The amended complaint added a request for declaratory judgment and, in addition to injunctive relief against the investigative hearing, sought a declaration that sec. 448.17 and sec. 448.18, Wis. Stats., were unconstitutional.

The investigative hearing was held by the Board on July 12 and 13, 1973. Numerous witnesses testified under oath, and the attorney for Dr. Larkin was present throughout the proceedings. The hearing was then adjourned to a future date.

Dr. Larkin was subsequently informed in writing, through his attorney, that if he wished, he could appear before the Board and explain any of the evidence which had been presented to it during its investigation.

On July 18, 1973, the district court denied a renewed motion for a temporary restraining order and thereafter the members of the Board filed a motion to dismiss the amended complaint.

On September 18, 1973, and under the authority granted to it by sec. 448.18 (7), Wis. Stats., the Board issued the following Notice of Contested Hearing to Dr. Larkin:

> "TAKE NOTICE that a contested hearing will be held on the Board's own motion on October 4, 1973 * * * to determine whether the licensee has practiced medicine in the State of Wisconsin under any other Christian or given name or any other surname than that under which he was originally licensed or registered to practice medicine in this state, which practicing has operated to unfairly compete with another practitioner, to mislead the public as to identity, or to otherwise result in detriment to the profession or the public, and more particularly, whether the said Duane Larkin, M.D., has practiced medicine in this state since September 1, 1971, under the name of Glen Johnson.
>
> "TAKE FURTHER NOTICE that the Board will also hear evidence to determine whether the licensee has permitted persons to practice medicine in this state in violation of sec. 448.02 (1), Stats., more particularly whether the said Duane Larkin, M.D., permitted Young Wahn Ahn, M.D., an unlicensed physician, to perform abortions at his abortion clinic during the year 1972.
>
> "TAKE FURTHER NOTICE that the Board will also hear evidence to determine whether the said Duane Larkin, M.D., split fees with other persons during the years 1971, 1972, and 1973 in violation of sec. 448.23 (1), Stats.

"Based on the evidence adduced at said contested hearing, the Medical Examining Board will determine whether to suspend the license of the said Duane Larkin, M.D., under the authority of sec. 448.18 (7), Stats."

On October 1, 1973, and in the absence of any hearing thereon, the district court, after being informed by affidavit of Dr. Larkin's attorney of his receipt of the above notice, issued a decision and order in which it granted Larkin's motion to convene a three-judge court and granted a motion for a temporary restraining order enjoining the members of the Board from proceeding with the contested hearing under sec. 448.18 (7), Wis. Stats., and from enforcing the provisions of that section of the statutes against Dr. Larkin. It also denied the motion of the members of the Board to dismiss the amended complaint.

The Board, on October 4, 1973, heard some additional witnesses and concluded its investigative hearing. Dr. Larkin did not appear, although his attorney did address the Board. Thereafter the Board issued its investigative findings of fact, conclusions of law, and decision.

A three-judge court was appointed. The members of the Board filed an answer to the amended complaint, in which they denied all material allegations other than those identifying the parties and alleging that a notice of investigative hearing had been issued by the Board. There was no consolidation of trial on the merits with the hearing on the motion for a preliminary injunction.

Neither the three-judge court nor the single judge held any evidentiary hearing on the motion for a preliminary injunction or on Dr. Larkin's allegation that sec. 448.17 and sec. 448.18, Wis. Stats., were unconstitutional. Absolutely no evidence in any form was presented in support of the claim of Dr. Larkin that these two sections of the Wisconsin statutes were

unconstitutional. The only support for the motion for preliminary injunction were affidavits of Larkin's counsel, which affidavits merely placed in the record certain newspaper articles, a copy of a letter from the attorney for the Board to Larkin's attorney, a copy of the Board's notice of contested hearing, the attorney's version of the evidence presented at the investigative hearing, and a copy of the Board's findings of fact, conclusions of law, and decision made upon completion of its investigative hearing.

The three-judge court heard arguments on the motion for a preliminary injunction on November 19, 1973. On that same date it orally declared that sec. 448.18 (7), Wis. Stats., was unconstitutional on the ground, as subsequently explained in its written decision, that:

"* * * for the board temporarily to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process. Insofar as §448.18 (7) authorizes a procedure wherein a physician stands to lose his liberty or property, absent the intervention of an independent, neutral and detached decision-maker, we concluded that it was unconstitutional and unenforceable." (App. 2, 3.)

It, further, and in the complete absence of any evidence from or even allegations by Dr. Larkin that he had no adequate remedy at law, that he had exhausted his administrative remedies, that there was a reasonable probability of success on the merits, that he would suffer irreparable and certain harm if the relief was not granted, and that granting such relief would not cause undue harm to the public interest, granted the motion for a preliminary injunction enjoining the members of the Board from utilizing sec. 448.18 (7), Wis. Stats. It made and filed no findings of fact and conclusions of law as required by Rule 52 (a), FRCP.

On December 21, 1973, the decision of the three-judge court was filed. Thereafter, on January 31, 1974, the court did enter a judgment. The members of the Medical Examining Board have appealed to this Court from that judgment.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL, IMPORTANT, AND REVIEW AND ACTION BY THIS COURT IS REQUIRED.

I. The Decision Below Is Contrary To Decisions Of This Court In All Material Respects.

A. The declaration that a state statute is unconstitutional in deciding a mere motion for a preliminary injunction is, as stated by this Court, "serious error" and requires reversal of the judgment.

Dr. Larkin's unverified amended complaint contains allegations that sec. 448.17 and sec. 448.18, Wis. Stats., were unconstitutional in certain specified respects. Larkin sought as ultimate relief in his action a declaration to this effect and a permanent injunction. He also made motions for a preliminary injunction, which motions failed to comply with the requirement of Rule 7 (b), FRCP, that a motion "shall state with particularity the grounds therefor." *No* grounds for granting any of Larkin's various motions for a preliminary injunction were stated therein.

There was no evidentiary hearing on the motion and absolutely no affidavits or other evidence were presented by Dr. Larkin to the three-judge court setting forth facts in support of the allegations in his amended complaint that the sections of the Wisconsin statutes in question were unconstitutional. There was no consolidation of the hearing on the

motion for a preliminary injunction with trial on the merits as can be done under the provisions of Rule 65 (a) (2), FRCP. The hearing consisted solely of oral argument on the groundless motion.

Despite this, the three-judge court declared in its decision granting the motion for a preliminary injunction that sec. 448.18 (7), Wis. Stats., is unconstitutional. (App. 4.) Its judgment granting the preliminary injunction reads:

> "It is Ordered and Adjudged that *§448.18 (7), Wis. Stats., is unconstitutional* and that the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats." (App. 5.) (Emphasis added.)

A three-judge court on a mere motion for a preliminary injunction cannot declare a state statute unconstitutional. This Court unanimously so held in *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774. In reversing the judgment therein, this Court, after pointing out that the lower court had declared a state statute unconstitutional, wrote (309 U.S. at 316):

> "We think the court committed *serious error* in thus dealing with the case upon motion for temporary injunction. *The question before it was not whether the act was constitutional or unconstitutional*; was not whether the Commission had complied with the requirements of the act, if valid, *but was whether the showing made raised serious questions, under the Federal Constitution and the state law, and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants."* (Emphasis added.)

A state statute, as well as a federal statute, is presumed to be constitutional. As pointed out in *Mayo* at pages 318 and 319, a mere allegation of unconstitutionality contained in

an unverified complaint does not even raise a substantial question. Unless the *evidence* presented at a hearing supports findings of fact and a conclusion of law that there is a substantial federal question involved, the mere presumption of constitutionality "would require the denial of a temporary injunction." Here there was no evidence at all.

The lower court's serious error in declaring a state statute unconstitutional in deciding a mere inadequate and groundless motion for a preliminary injunction, in support of which absolutely no evidence was presented, requires reversal of this judgment. This reversal error, however, is only one of many which resulted from the lower court's disregard of the applicable decisions of this Court.

B. The lower court decision that it is a violation of due process for an administrative agency to possess and exercise both investigative and adjudicative functions is contrary to the decisions of this Court.

1. This Court has held that the mixing of such functions in an administrative agency is not a violation of due process.

The lower court decided that because the members of the Board had investigated Dr. Larkin's medical practices, they could not, consistent with due process, hold a contested hearing and adjudicate the question of whether or not the Board should temporarily suspend Dr. Larkin's license to practice medicine. (App. 2, 3.) This is *not* a case, as in *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488,

where the lower court found that the members of the Board were disqualified by reason of bias or personal pecuniary interest in the outcome. The decision here was that the mere existence in and exercise of both investigative and adjudicative functions by the same administrative agency is a violation of due process. The lower court's decision is completely unsupported by any authority, legal or logical, and it is, in fact, contrary to the applicable decisions of this Court.

In *Federal Trade Comm. v. Cement Institute* (1948), 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010, reh. den. 334 U.S. 839, 68 S.Ct. 1492, 92 L.Ed. 1764, this Court found that members of the Federal Trade Commission, who on the basis of prior official investigations by them had concluded and publicly expressed the opinion that a certain cement industry trade practice was illegal, properly refused to disqualify themselves from hearing and passing on the same practice in a contested proceeding to determine whether a cease and desist order should issue. In so concluding, this Court discussed the difference between an ex parte investigation and a contested hearing and also discussed the rule of necessity, both of which discussions are also applicable to the present case.

In addition to the disqualification question, the claim was made in the above-cited case that it was a violation of due process for the members of the Federal Trade Commission to adjudicate, after having conducted an ex parte investigation and having determined that the involved practice was illegal. This Court also rejected that argument and wrote (333 U.S. at 702, 703):

> "Marquette also seems to argue that it was a denial of due process for the Commission to act in these proceedings after having expressed the view that industry-wide use of the basing point system was illegal. A number

of cases are cited as giving support to this contention. Tumey v. Ohio, 273 U.jS. 510, 47 S.Ct. 437, 71 L.Ed. 749, 50 A.L.R. 1243, is among them. But it provides no support for the contention. In that case Tumey had been convicted of a criminal offense, fined, and committed to jail by a judge who had a direct, personal, substantial, pecuniary interest in reaching his conclusion to convict. A criminal conviction by such a tribunal was held to violate procedural due process. But the Court there pointed out that most matters relating to judicial disqualification did not rise to a constitutional level. Id., at page 523 of 273 U.S., at page 441 of 47 S.Ct., 71 L.Ed. 749, 50 A.L.R. 1243.

"Neither the Tumey decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed on opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court."

More recently, in *Richardson v. Perales* (1971), 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed. 2d 842, this Court also rejected a comparable claim. It was argued to this Court that there was a denial of due process because the hearing examiner who heard and decided the case was not "an independent hearing examiner" in that he also had responsibility for gathering the evidence. This Court wrote (402 U.S. at 410):

"Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The social security hearing examiner, furthermore, does not act as counsel. *He acts as an examiner charged with developing the facts.* The 44.2% reversal rate for all federal disability hearings in cases where the state agency does not grant benefits * * * attests to the fairness of the system and refutes the implication of impropriety." (Emphasis added.)

"Developing the facts" is an investigative function and, therefore, this decision also is that combining investigative and adjudicative functions in a hearing examiner, let alone in a whole administrative agency, is not a denial of procedural due process. See also *National Labor Relations Bd. v. Donnelly Garment Co.* (1947), 330 U.S. 219, 226, 227, 67 S.Ct. 756, 91 L.Ed. 854, in which this Court held that no "legal requirements" had been violated because the Board refused a request for a new examiner to conduct a second hearing after the Board had assigned that hearing to the same examiner who had erred in his rulings and decision during the first hearing.

This Court has also held in a number of deportation cases, including *Marcello v. Bonds* (1955), 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107, that the right to due process was not violated because the Immigration Service has investigative, prosecutorial, and adjudicative functions and because a special inquiry officer, who exercised the adjudicative function, was subject to supervision and control by officials having investigative and prosecutorial functions.

There are some striking similarities, as well as glaring dissimilarities, between this appeal and that in *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488. In that case, this Court on the basis of considerations of equity, comity, and federalism vacated the judgment of a three-judge court in which that lower court had enjoined the members of the Alabama Optometry Board from conducting hearings on license revocation and from revoking the licenses of certain

corporation-employed optometrists. This Court, however, affirmed the determination of the lower court that, under the unique facts of the case, the members of the Board were disqualified from proceeding with the hearings because of bias based on substantial pecuniary interest in the outcome of the proceedings. This Court, therein, carefully noted, at 93 S.Ct. 1698 and footnote 17, that it did not reach and was not deciding the here involved question of the extent to which an administrative agency may investigate and then, consistent with due process, sit as an adjudicative body.

The decisions of this Court, as illustrated above, are that it is not a violation of due process for an administrative agency to possess and exercise both investigative and adjudicative functions. The decision of the lower court herein to that effect is clearly contrary to all applicable decisions of this Court. It is also contrary to all applicable decisions of the courts of appeal./[1]

2. The decision of the lower court misconstrues and misapplies certain decisions of this Court.

The decision of the lower court cites *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656,

1. See, for example, *Pangburn v. C.A.B.* (1st Cir. 1962), 311 F. 2d 349; *Intercontinental Indus. Inc. v. American Stock Exch.* (5th Cir. 1971), 452 F. 2d 935; *Duke v. North Texas State University* (5th Cir. 1973), 469 F. 2d 829, cert. den. — U.S. —, 93 S.Ct. 2760, 37 L.Ed. 2d 160; *Mack v. Florida State Board of Dentistry* (5th Cir. 1970), 430 F. 2d 862; *Federal Trade Comm. v. A. McLean & Son* (7th Cir. 1936), 84 F. 2d 910; *Federal Trade Comm. v. Cinderella Career and Finishing Schools, Inc.* (D.C. Cir. 1968), 404 F. 2d 1308; et al. This is *not* a case involving the possible disqualification of an individual board member, who prior to appointment to the board, was an agency employe involved in the case in an adversary capacity as in *Trans World Airlines v. Civil Aeronautics Board* (D.C. Cir. 1958), 254 F. 2d 90, and *Amos Treat & Co. v. Securities and Exchange Commission* (D.C. Cir. 1962), 306 F. 2d 260.

and *Morrissey v. Brewer* (1972), 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484, which deal with parole and probation revocation, for the proposition that one of the elements of minimal due process is an "independent decisionmaker." It, then, inappropriately applied these cases to the present situation and determined that:

> "* * * The state medical examining board does not qualify as such a decisionmaker. It cannot properly rule with regard to the merits of the same charges it *investigated* * * *." (App. 3, 4.) (Emphasis added.)

There is absolutely nothing in *Gagnon, Morrissey,* or *Goldberg v. Kelly* (1970), 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287, which involved termination of welfare benefits, which supports this determination by the lower court. These cases neither indicate that an administrative agency, such as the Medical Examining Board, cannot qualify as an independent decisionmaker nor do they have anything to say on the subject of the possession and exercise of both investigative and adjudicative functions by an administrative agency. They deal with *review of the decision* of an agency by the same agency, i.e., performing an adjudicative function to determine the correctness of its own prior adjudication.

These cases stand for the proposition that review of the decision or recommendation of agency personnel to terminate welfare benefits or to revoke parole or probation must be conducted by some person within the agency other than the initial decisionmaker. This is made clear in *Goldberg* when this Court wrote (397 U.S. at 271):

> "* * * And, of course, an impartial decision maker is essential. * * * We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision

maker. *He should not, however, have participated in making the determination under review.*" (Emphasis added.)

In *Morrissey* this Court further explained (408 U.S. at 486) that:

"* * * *The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them.* Goldberg v. Kelly found it unnecessary to impugn the motives of the caseworker to find a need for *an independent decisionmaker to examine the initial decision.*

"This independent officer need not be a judicial officer. The granting and revocation of parole are matters traditionally handled by administrative officers. In Goldberg, the Court pointedly did not require that the hearing on termination of benefits be conducted by a judicial officer or even before the traditional 'neutral and detached' officer; it required only that the hearing be conducted by some person *other* than one initially dealing with the case. * * *" (Emphasis added.)

What *Goldberg, Morrissey,* and *Gagnon* mandate in the present case is that IF the members of the Board had made a determination that the medical license of Dr. Larkin should be temporarily suspended,/[2] the members of the Board could not, consistent with minimal due process requirements, review the correctness of its own decision. Under these circumstances, the members of the Board would not be the required "independent decisionmaker" because they would be

2. The Board was enjoined from even *holding a hearing* on this question.

reviewing their own determination./[3] Of course, none of this happened in the present case.

Further, it would not have happened, since the very subsection of the Wisconsin statutes, which the lower court erroneously declared to be unconstitutional, requires review by an independent decisionmaker of any decision by the Board to temporarily suspend a license to practice medicine. Section 448.18 (7), Wis. Stats., concludes with the following provision:

"* * * All examining board actions under this subsection shall be subject to review under ch. 227."

Chapter 227, Wis. Stats., provides for judicial review of administrative agency decisions by the Circuit Court of Dane County, Wisconsin. A circuit judge is not only an "independent decisionmaker" as required by *Goldberg, Morrissey,* and *Gagnon,* but he is a "neutral and detached" judicial officer, which is specially not required. Dr. Larkin, therefore, would have received even more than minimal due process and the very subsection of the statutes improperly as well as erroneously declared by the lower court to be unconstitutional because it did not provide for an "independent decisionmaker," clearly and unequivocally provides even more than the required "independent decisionmaker."

3. On the basis of the holdings in *Goldberg, Morrissey,* and *Gagnon* is it a violation of due process for a district judge, who granted a motion for a temporary restraining order, to sit as a member of a three-judge district court to hear and adjudicate whether a motion for a preliminary injunction should be granted? Is he the required "independent decisionmaker" or is he actually reviewing the correctness of his own determination?

C. *The decision granting a preliminary injunction in this case is contrary to the decisions of this Court and, if any discretion to grant the motion arose, doing so constituted an abuse of discretion.*

A preliminary or interlocutory injunction is an extraordinary equitable remedy. The power to issue such an injunction is subject to abuse and, therefore, it should be exercised with great caution and only when the reason and necessity therefor is clearly established by the moving party. In general, see 43 C.J.S., *Injunctions*, §15, p. 426; 7 *Moore's Federal Practice*, §65.18 [3], and 11 Wright and Miller, *Federal Practice and Procedure*, §2948, pp. 428, 429. In the present case, the three-judge court granted the motion and in doing so completely disregarded all applicable decisions of this Court.

1. All applicable decisions of this Court were disregarded and violated by the decision of the lower court.

Various decisions of this Court have established or recognized the principles governing the availability of preliminary injunctive relief and the grounds for the granting of a motion therefor. An equitable remedy such as a preliminary injunction is not available when there is an adequate remedy at law./[4] Further, when, as here, state administrative proceedings are involved, which proceedings call into play administrative expertise, discretion, and fact finding, normally

4. *Terrace v. Thompson* (1923), 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; *Henneford v. Northern Pac. Ry. Co.* (1938), 303 U.S. 17, 58 S.Ct. 415, 82 L.Ed. 619; *Ex Parte Fahey* (1947), 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041; *Toomer v. Witsell* (1948), 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460; *Alabama Public Service Com'n. v. Southern Ry. Co.* (1951), 341 U.S. 363, 71 S.Ct. 775, 95 L.Ed. 1016; *Beacon Theatres, Inc. v. Westover* (1959), 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed. 2d 988; *Younger v. Harris* (1971), 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669; et al.

preliminary injunction is not available in the absence of exhaustion of administrative remedies. There are many decisions to this effect, and *contra*. See the discussion on this subject in *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488.

If there is no adequate remedy at law and there has been an exhaustion of administrative remedies, if required, the grounds for or factors to be considered in determining whether to grant a motion for preliminary injunction have been established by the decisions of this Court. First, there must be "irreparable," "grave," and "certain" injury to the movant if the requested relief is not granted./[5] Second, the question presented by the action must be "grave," "substantial," etc., i.e., there must be a reasonable probability or liklihood of success on the merits./[6] As stated in *Terrace v. Thompson* (1923), 263 U.S. 197, 214, 44 S.Ct. 15, 68 L.Ed. 255, however:

5. *Terrace v. Thompson* (1923), 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; *Massachusetts State Grange v. Benton* (1926), 272 U.S. 525, 47 S.Ct. 189, 71 L.Ed. 387; *Ohio Oil Co. v. Conway* (1929), 279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972; *State Corp. Commission v. Wichita Gas Co.* (1934), 290 U.S. 561, 54 S.Ct. 321, 78 L.Ed. 500; *Gibbs v. Buck* (1939), 307 U.S. 66, 59 S.Ct. 725, 83 L.Ed. 1111; *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774; *Watson v. Buck* (1941), 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416, *Toomer v. Witsell* (1948), 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460; *Beacon Theatres, Inc. v. Westover* (1959), 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed. 2d 988; *Cameron v. Johnson* (1968), 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed. 2d 182; *Younger v. Harris* (1971), 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669; *Sampson v. Murray* (1974), — U.S. —, 94 S.Ct. 937, 39 L.Ed. 2d 166.

6. *Ohio Oil Co. v. Conway* (1929), 279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972; *Massachusetts State Grange v. Benton* (1926), 272 U.S. 525, 42 S.Ct. 189, 71 L.Ed. 387; *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774; and many others.

"The unconstitutionality of a state law is not, of itself, ground for equitable relief in the courts of the United States. * * *"

Further, when, as here, injunction against the enforcement or operation of a state or federal statute is involved, the granting of the relief sought must not cause undue harm to the public interest./[7]

The party seeking injunctive relief has the burden of showing his eligibility for it and of establishing adequate grounds for the granting of his motion./[8] This burden and the decisions of this Court cited above mean that in the present case and before a preliminary injunction enjoining the enforcement and operation of a state statute could properly issue, Dr. Larkin had to prove to the Court or persuade it by proper evidence that:

a) he had no adequate remedy at law;

b) he had exhausted his administrative remedies;

c) he would suffer irreparable and certain harm if the requested relief was not granted;

d) he had a reasonable probability of success on the merits; and

e) such relief would not cause undue harm to the public interest.

---

7. *Pennsylvania v. Williams* (1935), 294 U.S. 176, 55 S.Ct. 380, 79 L.Ed. 841; *Virginian Ry. Co. v. System Federation* (1937), 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789; *Hecht Company v. Bowles* (1944), 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754; *Yakus v. United States* (1944), 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834; et al.

8. See such cases as *Railroad Commission of California v. Pacific Gas and Electric Co.* (1938), 302 U.S. 388, 58 S.Ct. 334, 82 L.Ed. 319, and *Illinois Commerce Commission v. Thomson* (1943), 318 U.S. 675, 63 S.Ct. 834, 87 L.Ed. 1075.

The evidence in support of a motion for a preliminary injunction is normally presented by the movant at a hearing and through the testimony of the moving party and other witnesses. It may, however, be in the form of proper affidavits and other admissible written materials. See generally, 11 Wright and Miller, *Federal Practice and Procedure*, §2949, p. 469, et seq., and 7 *Moore's Federal Practice*, §65.04 [3].

In the present case, however, Dr. Larkin presented ABSOLUTELY NO EVIDENCE in any shape or form to the court, which evidence established any, let alone all, of the above-mentioned requirements for the granting of his motion for a preliminary injunction. There was no evidentiary hearing and there were no affidavits or other written evidence presented by Dr. Larkin which in any way provided a factual basis showing the availability of equitable relief in this case or a factual basis supporting the granting of his motion.

In *Sampson v. Murray* (1974), — U.S. —, 94 S.Ct. 937, 39 L.Ed. 2d 166, this Court reversed the granting of equitable relief. In so doing, it pointed out that proof of actual irreparable injury was necessary and that (94 S.Ct. at 952):

"* * * the record before us indicates that no witnesses were heard on the issue of irreparable injury, that respondent's complaint was not verified, and that the affidavit she submitted to the District Court did not touch in any way upon considerations relevant to irreparable injury. We are therefore somewhat puzzled about the basis for the District Court's conclusion that respondent 'may suffer irreparable injury.' * * *"

Here also, no witnesses were heard on the issue of irreparable injury or any other issue; the amended complaint was unverified; Dr. Larkin personally submitted no affidavits in support of his motion and the only affidavits submitted did

not touch upon considerations relevant to irreparable injury or any other issue listed above. Further, there were no findings of fact and no adequate conclusions of law as required by Rule 52 (a), FRCP, and the decision and judgment issued enjoining the "utilizing" of sec. 448.18 (7), Wis. Stats., exceeded the lawful scope of a preliminary injunction.

2. If the lower court here possessed any discretion to grant the motion, its decision is an abuse of discretion.

Ordinarily a motion for a preliminary injunction is addressed to the discretion of the lower court and this Court will not reverse in the absence of an abuse of discretion. This, of course, makes sense, but only if the posture of the case is such that discretion arose in the lower court. When, as here, there is an inadequate motion in that no grounds for its granting are stated therein as required by Rule 7 (b), FRCP, and there is a total and complete absence of any evidence establishing any ground for the granting of the motion, the discretion of the lower court should not even arise.

If discretion to grant the motion was here possessed by the lower court, that court clearly abused its discretion in this case. This abuse is established not only by the fact that the lower court decided and acted on the basis of an inadequate motion and in the total absence of any evidence in support of the granting of the motion, but in addition and as discussed below, by the fact that the lower court did not file findings of fact and conclusions of law as required by Rule 52 (a), FRCP, and the fact that the preliminary injunction issued was overly broad and exceeded the lawful scope of a preliminary injunction.

Rule 52 (a), FRCP, provides in part:

> "* * *in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. * * * If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. * * *"

This Court has many times pointed out the importance of the findings of fact and conclusions of law required by Rule 52 (a) when a motion for interlocutory injunction is granted or refused.[9] There must be findings of fact which are sufficient to indicate a factual basis for the ultimate conclusion. *Kelley v. Everglades Drainage District* (1943), 319 U.S. 415, 422, 63 S.Ct. 1141, 87 L.Ed. 1485, and *Sampson v. Murray* (1974), — U.S. —, 94 S.Ct. 937, 39 L.Ed. 2d 166.

In the present case, there was absolutely no evidence. The district court, therefore, could not and did not make any findings of fact, either in the form of Findings of Fact and Conclusions of Law or in the alternative form of its decision. A careful reading of the decision reveals that the district court erroneously arrived at two[10] of the here necessary

9. See, for example, *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774, and *Hatahley v. United States* (1956), 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065.

10. In its decision it appears that the court, without any evidence, arrived at the conclusion that Dr. Larkin had no adequate remedy at law (App. 4). This is solely based on an erroneous interpretation of the Wisconsin statutes. Contrary to the content of the decision, the constitutionality of "the statute *empowering* the board to act in the first instance" can be attacked in a ch. 227 judicial review of an administrative decision. Section 227.20, Wis. Stats., is on the subject of scope of review. The last sentence in sec. 227.20 (2), Wis. Stats., specially allows such a challenge. In fact, during the pendency of such a challenge the court may order a stay of the administrative decision. See sec. 227.17, Wis. Stats.

Further, the completely improper and erroneous declaration that sec. 448.18 (7), Wis. Stats., is unconstitutional (App. 4) might be construed as the necessary conclusion that Dr. Larkin had a reasonable probability of success on the merits. It should be noted, however, that Dr. Larkin's assertions of why the statutes alleged by him to be unconstitutional are unconstitutional are contained only in his unverified amended complaint. The lower court did *not* find any merit in Dr. Larkin's assertions, but made up its own reason why sec. 448.18 (7), Wis. Stats., "is unconstitutional," which reason is without a factual basis in the evidence, overlooks the last sentence of the statute involved, and as shown in Argument I, B, *supra*, is contrary to all applicable decisions of this Court and the courts of appeals.

five/[11] conclusions of law. There can be no valid conclusions of law, however, in the absence of findings of fact supported by the evidence presented to the court. When, as here, there is no evidence there can be no findings of fact and conclusions of law.

The fact that the district court here erred in declaring a state statute unconstitutional on a mere motion for a preliminary injunction, caused the court to again err in that it entered a preliminary injunction which is too broad in scope. The judgment of the district court herein provides:

> "* * * the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats." (App. 5.)

This means, or at least appears to mean, that the Board is enjoined from utilizing the provisions of sec. 448.18 (7), Wis. Stats., to temporarily suspend the medical license of any licensee, not just Dr. Larkin, and is so enjoined whether or not it had previously conducted an investigation under the provisions of sec. 448.17, Wis. Stats. If it does so mean, such broad relief is completely beyond the scope of a preliminary injunction, which is a device for maintaining the status quo between the parties pending a decision on the merits. The purposes of a preliminary injunction are to protect the movant therefor, here only Dr. Larkin, from suffering irreparable injury during the pendency of the action and to preserve the court's power to render a meaningful decision after trial on the merits of the case. See, 11 Wright and Miller, *Federal Practice and Procedure*, §2947, p. 423.

---

11. There was no conclusion, as is essential, that Dr. Larkin would suffer irreparable injury if the requested relief was not granted and no conclusion that Dr. Larkin had exhausted his administrative remedies or that the granting of the relief sought would not cause undue harm to the public interest.

A federal district court has no power to enjoin the general application of a state statute unless and until it finds that the statute is unconstitutional after trial on the merits.

If, and despite the sweeping language of the judgment, the defendants are preliminarily enjoined from utilization of the state statute against Dr. Larkin only, the judgment is in violation of Rule 65 (d), FRCP, because of the lack of reasonable specificity. See, *Schmidt v. Lessard* (1974), — U.S. —, 94 S.Ct. 713, 38 L.Ed. 2d 661.

The decision of the lower court must be reversed, either summarily or after briefs and oral argument before this Court, because it is contrary to all applicable decisions of this Court. It improperly and erroneously declares that a state statute is unconstitutional in deciding a mere motion for a preliminary injunction; it erroneously decided that it is a violation of due process for an administrative agency to possess and exercise both investigative and adjudicative functions; and it erroneously decided to and did grant overly broad preliminary injunctive relief in the total absence of any allegations or any evidence establishing either the availability of such relief in this case or any grounds for the granting of the relief, the latter being an abuse of discretion, if any discretion to grant the motion was here possessed by the lower court.

II. The Decision Of The Lower Court Is The Result Of Such A Departure From The Accepted And Usual Course Of Judicial Proceedings That This Court Should Exercise Its Power Of Supervision Over Lower Federal Courts And Take Appropriate Action.

In recent years this Court has become concerned with the inappropriate interference of lower federal courts in various

state court actions and state administrative proceedings and with the tendency of some lower federal courts to fail to recognize the existence and efficacy of state court systems. This concern is reflected in such cases as *Younger v. Harris* (1971), 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669; *Askew v. Hargrave* (1971), 401 U.S. 476, 91 S.Ct. 856, 28 L. Ed. 2d 196; *Mitchum v. Foster* (1972), 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed. 2d 705; and *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488.

This same concern has long been shared by Congress which has passed the anti-injunction statute, 28 U.S.C. 2283, and 28 U.S.C. §2281 requiring, in part, that when, as here, a preliminary injunction is sought in a federal court to enjoin the enforcement of a state statute on the ground of its alleged unconstitutionality such a motion must be decided by a three-judge court. The purpose of 28 U.S.C. §2281 was stated by this Court in *Moody v. Flowers* (1967), 387 U.S. 97, 101, 87 S.Ct. 1544, 18 L.Ed. 2d 643, in which it wrote:

> "* * * The purpose of §2281 is 'to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order' (Kennedy v Mendoza-Martinez, 372 US 144, 154, 9 L ed 2d 644, 652, 83 S Ct 554), and to provide 'procedural protection against an improvident statewide doom by a federal court of a state's legislative policy.' Phillips v United States, 312 US 246, 251, 85 L ed 2d 800, 805, 61 S Ct 480. * * *"

In the present case, there was no abstention, or consideration of the question whether the federal court should abstain, and there was no recognition of the principles of equity, comity, and federalism. There was a three-judge

court, but this device was ineffective in achieving the basic purpose of §2281, since it did not provide "protection against an improvident statewide doom by a federal court of a state's legislative policy."/12

The three-judge court herein not only improperly and erroneously declared a state statute unconstitutional and erroneously enjoined its general utilization in deciding a mere motion for a preliminary injunction, but it even failed to follow the applicable requirements of the Federal Rules of Civil Procedure, which are designed to afford procedural due process to *both* parties in an action. Here, however, in the name of a nonexistent concept of affording minimal due process to Dr. Larkin, the lower court herein denied to the members of the Board, and indirectly to all citizens of the State of Wisconsin whom they represent, procedural due process as it does exist in black and white in the Federal Rules of Civil Procedure.

The lower court herein entered a declaratory judgment declaring a state statute unconstitutional on a mere motion for a preliminary injunction, in the total absence of any evidence supporting such a conclusion, and in the absence of a trial on the merits as contemplated by Rule 57, FRCP; it granted the motion which motion was legally insufficient and inadequate under Rule 7 (b), FRCP; it conducted no evidentiary hearing, in violation of the intent, if not the letter, of Rule 65 (b), FRCP; it decided to grant a motion without any

---

12. This Court has held that in exercising its valid objective of protecting the health and welfare of its citizens the state may regulate the practice of medicine and may create and vest in an administrative board the supervision and enforcement of such regulations. See, *Semler v. Oregon State Board of Dental Examiners* (1935), 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086, and *Geiger v. Jenkins* (1971), 401 U.S. 985, 91 S.Ct. 1236, 28 L.Ed. 2d 525, summarily affirming *Geiger v. Jenkins* (N.D. Ga. 1970), 316 F. Supp. 370.

evidence in support of such action, and failed to file the findings of fact and conclusions of law required by Rule 52 (a), FRCP; the form and scope of its preliminary injunction fails to comply with Rule 65 (d), FRCP, and it was only after the members of the Board made a motion for entry of judgment and submitted a brief in support thereof that the court entered a judgment as defined by Rule 54 (a), FRCP, and in at least token compliance with Rule 58 and Rule 65 (d), FRCP.

In the somewhat comparable, but less flagrant, case of *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774, this Court unanimously reversed a judgment in which the lower court on a mere motion for a preliminary injunction declared a state statute to be unconstitutional. The majority reversed and remanded the case to the lower court for proper action. The concurring justices, however, would have ordered dismissal as to certain appellees and a dissolving of the three-judge court as to the remaining appellees. Justice Frankfurter, in whose concurring opinion Justices Black and Douglas joined, viewed the judgment of the three-judge court as a flagrant abuse of the judicial process and wrote (309 U.S. at 321, 322):

> "I do not believe we should now let this bill hang over next year's crop. *We ought not to encourage the use of the judicial process for such unjustifiable attempts to set aside a state law by allowing them to be successful in result even though legally erroneous.* We ought to apply what was characterized in Massachusetts State Grange v. Benton, 272 US 525, 527, 71 L ed 387, 390, 47 S Ct 189, as 'the important rule, which we desire to emphasize, that no injunction ought to issue against officers of a State clothed with authority to enforce the law in

> question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury.' * * * Congress has also given indication in §266 of the Judicial Code (28 USCA §380) of its *concern over the misuse of the injunction, fashioned for settling an ordinary clash of private interests, to restrain the machinery of a state in carrying out some vital state policy.*
>
> *"The supervisory power of this Court over the district courts becomes especially appropriate in equity suits. We ought to feel free to apply the traditional powers of the chancellor on appeal to act as though the suit were before him de novo.* Compare United States v. Rio Grande Dam & Irrig. Co. 184 US 416, 423, 46 L ed 619, 622, 22 S Ct 428. The present case demands that we enforce the 'important rule' of Massachusetts State Grange v. Benton, 272 US 525, 71 L ed 387, 47 S Ct 189, supra.
>
> *"Inasmuch as the Florida statute is obviously constitutional, the bill does not raise a substantial federal question* and the District Court was without jurisdiction to entertain it on behalf of the appellees who are citizens of Florida. As to them, the case should be remanded to the District Court with directions to dismiss the bill." (Emphasis added.)

Here also sec. 448.18 (7), Wis. Stats., "is obviously constitutional," since the last sentence thereof expressly provides for the "independent decisionmaker" which the lower court found to be absent. Under these circumstances there should be reversal and remand with directions to dismiss the amended complaint herein accompanied by appropriate directions to the lower court aimed at stopping the abuse of injunctive relief revealed by this case and at restoring obeyance to the decisions of this Court and the accepted and usual course of judicial proceedings as set forth in the Federal Rules of Civil Procedure.

III. The Effect Of The Decision Below Is Widespread And Undesirable.

The very nature of administrative agencies at all levels of government is that they possess and exercise a variety of functions, normally including investigative and adjudicative functions. If the decision of the lower court in this case is correct, it will have a major and destructive impact on all administrative agencies. It will also have a major and destructive impact on the conduct of the people's increasingly complex public business, for it is to handle such public "business" that administrative agencies were created, have been developed, and have grown in size and scope of responsibility and activity. Although administrative agencies have many faults, the decision in this case, just as the comparatively miniscule "advocate-judge-multiple-hat suggestion" rejected by this Court in *Richardson v. Perales* (1971), 402 U.S. 389, 410, 91 S.Ct. 1420, 28 L.Ed. 2d 842:

> "* * * assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. * * *"

The decision in this case is NOT that it is a violation of due process for an agency employe who investigated a matter to act as an adjudicator of the same matter; it is NOT that it is a violation of due process for an individual member of a board or commission to refuse to disqualify himself or for the board or commission to refuse to disqualify him, when he is, in fact, disqualified by actual bias, direct pecuniary interest in the outcome, prior personal involvement as an adversary in the same matter, et al., and it is NOT that it is a violation of due process for an illegally constituted board

or commission to adjudicate. The decision here IS that the mere possession and exercise of both investigative and adjudicative functions by the same agency is a violation of due process.

If this is true, all local, state, and federal legislative grants of power to adjudicate to agencies also possessing the power to investigate the same subject or subject matter are unconstitutional as a violation of due process. This includes every major federal administrative agency and even those whose adjudications fall within the coverage of the Federal Administrative Procedure Act.

The Federal Administrative Procedure Act recognizes that an administrative agency may possess and exercise both investigative and adjudicative functions. On the basis of this fact, the present decision also makes the APA unconstitutional even though §554 (d) thereof does attempt to insulate certain[13] adjudications of covered agencies,[14] which adjudications are made by agency employes, from influence by other employes possessing investigative and prosecuting functions.

In fact, under the provisions of the Federal Administrative Procedure Act and contrary to the decision in this case, it is entirely proper for the members of the Wisconsin Medical Examining Board to conduct a contested hearing and to adjudicate whether or not Dr. Larkin's license to practice medicine in Wisconsin should be temporarily suspended after they had conducted an ex parte investigation of

---

13. That subsection does not apply "(A) in determining applications for initial licenses; (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or (C) *to the agency or a member or members of the body comprising the agency.*" 5 U.S.C. §554 (d).

14. Some agencies, such as the Immigration Service, are not covered by the APA. See *Marcello v. Bonds* (1955), 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107.

his medical practices. See the emphasized portion of 5 U.S.C. §554 (d) (2) (C), found in footnote 13, *supra*.

CONCLUSION

For the reasons stated above this Court should either summarily reverse the judgment herein and remand this case to the district court with directions to dismiss the action or it should note probable jursidiction herein.

Respectfully submitted,

ROBERT W. WARREN
Attorney General of Wisconsin

BETTY R. BROWN
Solicitor General of Wisconsin

LE ROY L. DALTON
Assistant Attorney General of Wisconsin

Counsel for Appellants

P.O. Address:
114 East, State Capitol
Madison, Wisconsin 53702

April 18, 1974

APPENDIX

INDEX TO APPENDIX

Page

DECISION of the Three-Judge United States District Court for the Eastern District of Wisconsin, dated December 21, 1973 2

JUDGMENT on Decision by the Three-Judge United States District Court for the Eastern District of Wisconsin, dated January 31, 1974 4

NOTICE OF APPEAL to the Supreme Court of the United States, dated February 28, 1974, and filed in the United States District Court for the Eastern District of Wisconsin on March 1, 1974 6

DECISION of the Three-Judge United States District Court for the Eastern District of Wisconsin, dated December 21, 1973:

DUANE LARKIN, M.D.,
Plaintiff,

v. No. 73-C-360

HAROLD WITHROW, D.O., et al.,
Defendants.

DECISION

On November 19, 1973, this three-judge court sustained the plaintiff's procedural due process challenge to the constitutionality of § 448.18 (7) Wis. Stats. (1971). We enjoined the state medical examining board from enforcing that statute, which authorized it to suspend a physician's license for up to two consecutive three-month periods "without formal proceedings . . . where he is known or the examining board has good cause to believe" that he has engaged in certain proscribed conduct. Vague as it is, "(E)ngaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public" qualifies as one such offense. See § 448.18 (1) (a), Wis. Stats. (1971).

Permanent revocation of a physician's license can be accomplished only through a court action prosecuted by the district attorney. The state medical examining board investigated the plaintiff, Dr. Duane Larkin, and presented charges to the district attorney. See § 447 [sic], Wis. Stats. (1971). Neither the propriety of the board's investigation of Dr. Larkin nor the merits of its charges against him was involved here. What we determined was that for the board temporarily to

suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process. Insofar as § 448.18 (7) authorizes a procedure wherein a physician stands to lose his liberty or property, absent the intervention of an independent, neutral and detached decisionmaker, we concluded that it was unconstitutional and unenforceable.

Procedural due process is required in those instances where a person stands to see significant interference with his property rights or his liberty. Board of Regents v. Roth, 408 U.S. 564 (1972). In our view, the interference with a physician's ability to practice his profession qualifies as an interference with a property right. It is certainly "a sufficiently direct threat of personal detriment." Doe v. Bolton, 410 U.S. 179, 188 (1973).

The suspension of his license to practice medicine, as the result of charges of improper conduct, presumptively has a serious adverse effect on the physician's reputation. Thus, it is clear that the plaintiff's liberty is also at stake. 408 U.S. at 573. "There is little doubt but that a person's interest in his reputation is sufficient to trigger procedural due process protection." Suarez v. Weaver, — F. 2d — (7th Cir., case number 72-1656, decided September 14, 1973). See also Wisconsin v. Constantineau, 400 U.S. 433 (1971); and Weiman v. Updegraff, 344 U.S. 183 (1952).

In several cases involving hearings required by due process, the United States Supreme Court has delved into the area of minimal due process requirements. In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Court reaffirmed the principle of Morrissey v. Brewer, 408 U.S. 471 (1972), that one of the minimum elements of such hearings is "an independent decisionmaker." 411 U.S. at 786. The state medical examining board

does not qualify as such a decisionmaker. It cannot properly rule with regard to the merits of the same charges it investigated and, as in this case, presented to the district attorney.

It is true that any action taken by the board pursuant to § 448.18 (7) is subject to judicial review under § 227, Wis. Stats. (1971). However, that review statute goes only to the propriety of the board's *exercise* of statutory authority. We found that the very statutory authority *empowering* the board to act in the first instance was itself unconstitutional.

For these reasons, on November 19, 1973, we ordered that the plaintiff's motion for a preliminary injunction be granted. The defendants were enjoined from enforcing the provisions of § 448.18 (7), Wis. Stats. (1971), it having been determined by us that such statute is unconstitutional.

Dated at Milwaukee, Wisconsin, this 21st day of December, 1973.

/s/ F. Ryan Duffy
F. Ryan Duffy, Sr. Circuit Judge

/s/ John W. Reynolds
John W. Reynolds, U.S. District Judge

/s/ Myron L. Gordon
Myron L. Gordon, U.S. District Judge

JUDGMENT on Decision by the Court, dated January 31, 1974:

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WISCONSIN

Civil Action File No. 73-C-360

DUANE LARKIN, M.D.,
Plaintiff,

vs.

JUDGMENT

HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.; A. J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.; J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.; MARK T. O'MEARA, M.D.; THOMAS W. TORMEY, JR., M.D., individually and as members of the Medical Examining Board of the State of Wisconsin,
Defendants.

This action came on for hearing before the Court, Honorable F. Ryan Duffy, Senior United States Circuit Judge, Honorable John W. Reynolds, United States District Judge and the Honorable Myron L. Gordon, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged that §448.18 (7), Wis. Stats., is unconstitutional and that the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats.

APPROVED:

/s/ F. Ryan Duffy
F. Ryan Duffy, Sr. U.S. Circuit Judge

/s/ John W. Reynolds
John W. Reynolds, U.S. District Judge

/s/ Myron L. Gordon
Myron L. Gordon, U.S. District Judge

Dated at Milwaukee, Wisconsin, this 31st day of January, 1974.

s/ Ruth W. LaFave
Clerk of Court

NOTICE OF APPEAL to the Supreme Court of the United States, dated February 28, 1974, and filed in the United States District Court for the Eastern District of Wisconsin on March 1, 1974:

DUANE LARKIN, M.D.,
Plaintiff,

v. No. 73-C-360

HAROLD WITHROW, D.O.;
THOMAS HENNEY, M.D.;
A. J. SANFELIPPO, M.D.;
JOHN M. IRVIN, M.D.;
J. W. RUPEL, M.D.;
A. L. FREEDMAN, M.D.;
MARK T. O'MEARA, M.D.;
THOMAS W. TORMEY, JR., M.D.;
individually and as members of
the Medical Examining Board of
the State of Wisconsin,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that the defendants do hereby appeal to the Supreme Court of the United States from the judgment of the three-judge court in the captioned matter entered on the 31st day of January, 1974, by the three-judge court of the United States District Court for the Eastern District of Wisconsin made up of the Honorable F. Ryan Duffy, Sr., United States Circuit Judge, the Honorable John W. Reynolds, United States District Judge, and the Honorable Myron L. Gordon, United States District Judge.

This appeal is taken pursuant to 28 U.S.C. §1253.

Dated this 28th day of February, 1974.

ROBERT W. WARREN
Attorney General of Wisconsin

/s/ LeRoy L. Dalton
LE ROY L. DALTON
Assistant Attorney General

Attorneys for Defendants-Appellants

P.O. Address:
Room 114 East, State Capitol
Madison, Wisconsin 53702

Telephone: 608-266-3863